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Supreme Court, U.S.
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No. 98-727

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

TERESA L. CUNNINGHAM,
Petitioner,

v.

HAMILTON COUNTY, OHIO,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

When may an attorney appeal a sanctions order: (i) not until final judgment (the rule in the Sixth and Tenth Circuits); (ii) immediately, *so long* as *she* is no longer participating in the case (the rule in the Fifth Circuit); (iii) immediately, *so long* as *she* is no longer participating *and* the appeal is not intertwined with the merits of the case (the rule in the Third Circuit); (iv) immediately, *so long as* the sanction is "significant" (the rule in the Eleventh Circuit); or (v) immediately, without conditions (the rule in the Second, Seventh, Eighth, and Ninth Circuits, but rejected by the First, Fourth, and Federal Circuits)?

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, Plaintiffs Darwin Lee Starcher and Kathy Brown and Defendants-Appellees Correctional Medical Systems, Inc., Simon Leis, Sally Remillard, and Joseph Spriggs were parties to the proceedings below.

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BRIEF FOR THE RESPONDENT

The Respondent concurs with and adopts the Petitioner's descriptions of jurisdictional and the statutory provisions involved in this matter.

STATEMENT OF THE CASE

The sole issue in this case is whether an attorney may immediately appeal a Civil Rule 37 sanctions order. Petitioner Teresa Cunningham was plaintiff's counsel in a federal lawsuit against Respondent Hamilton County and Correctional Medical Services, Inc. (hereinafter CMS). The District Court ordered her to pay Hamilton County $1,494.00 for costs resulting from her "egregious" discovery violations, but stayed the order pending a final judgment. Cunningham appealed at once to the Sixth Circuit Court of Appeals. The court directed the parties to brief the issue of whether the sanctions order was an appealable order.

During the pendency of that appeal, the District Court entered a final order dismissing the plaintiff's case. The plaintiff appealed on the merits, but neither the plaintiff or Cunningham appealed the sanctions order, despite the questioned validity of Cunningham's earlier pending appeal, and the risk that it could be dismissed. Cunningham did not join in the appeal on the merits. Cunningham's interlocutory appeal of the sanctions order was later dismissed by the Sixth Circuit, for lack of jurisdiction. Because she failed to raise the sanctions issue in the appeal from the final order of judgment, the sanctions issue was waived.

A. The Underlying Litigation

The underlying case arises from the suicide of Casey Starcher while incarcerated at the Hamilton County Justice Center. Petitioner Cunningham filed the lawsuit on behalf of Casey's father, Darwin Starcher. (Darwin Starcher died during the course of the litigation and his daughter was substituted as a plaintiff). Casey Starcher had been transported to the Hamilton County Justice Center for a post-conviction hearing[1], at which his motion for relief was denied. The Complaint alleged that Hamilton County and its co-defendant Correctional Medical System, Inc. (a subcontractor providing medical services at the Justice Center), failed to prevent Starcher from committing suicide.

The Magistrate Judge issued a scheduling order on March 18, 1996. Among other things, the order required the Plaintiffs to identify their expert witnesses and materials not later than June 7, 1996, and the Defendants to do so not later than July 19, 1996. On May 29, 1996, the Defendants served interrogatories and document requests. Cunningham informed defense counsel that she could not respond to the discovery requests because the Plaintiff, Darwin Starcher, had died. Efforts to resolve the matter informally were to no avail. Given the proximity of their own disclosure date, the Defendants filed a motion to compel the Plaintiff to respond to the interrogatories and document production requests.

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[1] Starcher had previously pled guilty to and been convicted of four felonies in the Hamilton County Court of Common Pleas: aggravated robbery, escape, receiving stolen property and unlawful possession of a dangerous ordnance. Petitioner also represented Starcher in the post-conviction motion.

Magistrate Judge Cook conducted a discovery conference on July 10, 1996, seeking to resolve these and other pending discovery disputes. The Magistrate Judge ordered the Plaintiff to provide full and complete responses to the discovery requests by July 12, 1996. Further, the Magistrate Judge ordered that depositions of two witnesses for the Plaintiff and of two Defendants be held on July 25, 1996, subject to the condition that the Defendants' depositions would go forward only if Plaintiff had complied with his order to produce the written discovery by July 12. *Jt. App.* 1, Doc. 27.

The Petitioner ignored both directives. She responded instead with objections, incomplete responses to some of the interrogatories and no response at all to others. She produced none of the requested documents. Notwithstanding the Magistrate Judge's express order, with its specific dates, Petitioner Cunningham, unilaterally, sent notice to the defendants that one of her witnesses' deposition would take place in Indianapolis, Indiana on July 22, not July 25, as set out by the Magistrate Judge's order. This conduct led to motions for protective orders and sanctions by the defendants and cross motions by the plaintiff.

B. Sanctions Imposed by the Magistrate Judge for "Egregious" Conduct of Counsel.

On July 19, 1996, the Magistrate Judge held a hearing on the discovery motions. Although Petitioner now complains about notice of that hearing, she did attend and made neither an objection nor a motion for additional time to prepare. The Magistrate Judge denied Plaintiff's motions and granted Defendants's motions, finding Petitioner's conduct "egregious." *Jt. App.* 20. He ordered Cunningham to provide full and complete responses to the discovery requests

within ten days, and granted the Defendants' motion for protective order concerning the depositions of the two individual defendants, pending compliance with the discovery order.

The Magistrate Judge also granted the Defendants' motions for sanctions under Fed. R. Civ. P. 37 and instructed defense counsel to submit a statement indicating their reasonable fees and expenses. The Petitioner was subsequently ordered to pay the Treasurer of Hamilton County, Ohio, $1,494.00,[2] representing costs and attorney fees incurred by the Office of the Hamilton County Prosecuting Attorney, as counsel for the County Defendants. *Jt. App.* 21 Petitioner was also ordered to pay $2,432.00 to the law firm representing the co-defendants, but that order has not been appealed.

C. The District Court's Order Affirming the Sanctions.

Petitioner and her client objected to the Magistrate Judge's orders. U.S. District Court Judge Sandra S. Beckwith affirmed the sanctions by Order on October 22, 1996, but granted a stay pending final disposition. (The sanctions have yet to be paid.) The Court also disqualified Cunningham because she was a key fact witness regarding a discussion she alleged she had with Joseph Spriggs, a named defendant and an employee of CMS. *Jt. App.* 22-32. That discussion was the linchpin of Plaintiff's claim that the Defendants had been given notice that Starcher was at risk to

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[2] The Sixth Circuit Court of Appeals cites the sum of $1,690.50. As Petitioner noted in her brief, that is incorrect. The Magistrate Judge reduced the requested amount to $1,494.00. The sanctions awarded to the other defendants were later settled.

commit suicide.

The Petitioner's involvement in the underlying case did not end, however. The District Court imposed additional monetary sanctions, in the amount of $29,000.00, against her on March 23, 1998, payable to CMS. *Jt. App.* 8, Doc. 200. She remained active, as well, contesting various orders directed to her by the Court. *Jt. App.* 6-9, Doc. Nos. 133-219. Although Cunningham appealed the later sanction against her, she did not join in the appeal on the merits or ask the Court of Appeals to consolidate the three (3) pending appellate cases.

D. The Decision by the Court of Appeals

The Petitioner appealed to the United States Court of Appeals for the Sixth Circuit from the District Court's first order imposing sanctions. The Defendants moved to dismiss the appeal on the ground that the sanctions order was not a final, appealable order, as required by 28 U.S.C. § 1291. The Sixth Circuit acknowledged a split among the Circuits on the question of whether interlocutory awards of sanctions against a party's attorney is immediately appealable.[3] Consequently, the parties were ordered to address the issue in their merit briefs. *Jt. App.* 33-34. Thus Petitioner was on notice as to the questioned jurisdiction of the Court of Appeals, and briefed the issue to the Sixth Circuit, several months before the district court granted summary judgment on the merits of the underlying case. *Jt. App.* 7, Doc 187.

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[3] A Sixth Circuit order denying the initial motion to dismiss, refers to sanctions under Rule 11 of the Federal Rules of Civil Procedure. In fact, sanctions were imposed against Petitioner, pursuant to Rules 26 and 37 of the Federal Rules of Civil Procedure. *Jt. App.* 16.

The circuit court ultimately concluded that it had no jurisdiction and dismissed Cunningham's appeal. *Starcher v. Correctional Medical Sys., Inc.*, 144 F.3d 418 (6th Cir. 1998). The court held that the sanctions order was not a final appealable order, and did not satisfy the second element of the *Cohen* doctrine which requires that to be excepted from the final judgment rule the order in question must resolve an important issue completely separate from the merits. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). The court also concluded that an appeal after a final resolution of the underlying case and Cunningham's status as former counsel would not render effective review impossible.

SUMMARY OF ARGUMENT

An order imposing sanctions on a party's attorney is not a final order that can be appealed pursuant to 28 U.S.C. § 1291, and does not fall within any recognized exception to the rule. Even when such an order directs the Petitioner to pay fees, costs or other financial penalties, it does not satisfy each of the criteria of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) and *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). Indeed, it is at least arguable that sanctions orders satisfy *none* of those criteria.

For example, while both the parties and the Court below considered it effectively "beyond dispute that the first *Cohen* factor is satisfied here," that is not necessarily so. At least one circuit has challenged the assumption that merely establishing an amount certain for the sanction provides a conclusive determination of the matter.[4] Subsequent

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[4] *In Re Licht & Semonoff*, 796 F.2d 564, 570 (1st Cir.1986)

developments could result in the order's modification prior to final judgment on the merits. The court might rescind it, reduce it or increase it. Therefore, even a specific dollar figure may not, in fact, satisfy the requirement that the order determine the disputed question conclusively.

Second, this case does not involve an "important right" that is completely separate from the merits of the underlying action. Instead, Petitioner calls on appellate courts to review, for abuse of discretion, a factually driven decision which is inextricably entwined with the facts of the underlying case. Any "right" that might be implicated if Petitioner is required to wait until the end of the main case before seeking appellate review of her sanctions, will not be irreparably harmed. Indeed, in view of the stay granted by the District Court, Petitioner has suffered no harm in this case.

Finally, there is no reason a sanctioned attorney cannot appeal the sanction in her own right and on her own behalf at the case's conclusion. This is so irrespective of whether she still represents the client.

The efficient administration of justice will be best served by a single appellate review, where all issues raised by the case can be fully reviewed and decided. An interlocutory appeal of the District Judge's decision will undermine the authority of the District Court and will impose unreasonable disruption, delay and expense on the parties.

ARGUMENT

Generally, a party may not take an appeal under 28 United States Code, Section 1291 until there has been a decision by the district court that "ends the litigation on the merits and leaves nothing for the court to do but execute

judgment." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521 (1988). "[R]estricting appellate review to 'final decisions' prevents the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in a practical consequence, but a single controversy." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 471 (1978).

Allowing the interlocutory appeal of sanctions imposed under Rule 37 will create additional dangers, as recognized by the Third Circuit in *Eastern Maico Distributors, Inc. v. Maico-Fahrzeugfabrik*, 658 F.2d 944 (3d Cir. 1981), that:

> [T]o permit an immediate appeal would be to undermine Rule 37(a)(4). If every sanction imposed to deter delay were immediately appealable, a litigant could forestall resolution of its case almost indefinitely, or for so long as the trial judge sought to impose sanctions. The Court's only recourse would be to withhold sanctions, but doing so would negate any effect Rule 37(a)(4) could ordinarily have...the possibilities for delay are equally great if an attorney may immediately appeal any sanctions imposed against himself .... Otherwise, Mr. McIntyre's action would chart a course available to any attorney seeking to delay: voluntary acceptance of the Rule 37(a) sanction followed by an immediate appeal.... A court's response to a rule which would allow immediate appeal by an attorney ...might well be to refuse to sanction attorneys at all. That such an outcome would eliminate what was clearly envisioned as a purpose of Rule 37: a means of sanctioning attorneys who unnecessarily delayed proceedings.

Id. at 948-949 (footnote omitted).

The Court has consistently limited expansion of appellate jurisdiction by restricting interlocutory appeals to only the most important of rights. A pretrial discovery sanction, under Rule 37, is not such a case.

I. A Sanction Imposed On An Attorney During Pretrial Dicovery Is Not A "Final" Appealable Order Under 28 U.S.C. § 1291.

A. The Final Judgment Rule Promotes Efficient Judicial Administration and Avoids Undue Delay.

> Immediate review of every trial court ruling, while permitting more prompt correction of erroneous decisions, would impose unreasonable disruption, delay and expense. It would also undermine the ability of district judges to supervise litigation. In § 1291 Congress has expressed a preference that some erroneous trial court rulings go uncorrected until the appeal of a final judgment, rather than having litigation punctuated by "piecemeal appellate review of trial court decisions which do not terminate the litigation."

Richardson-Merrell inc. v. Koller, 472 U.S. 424, 430 (1985).

The statutory requirement of a final judgment is a logical rule that the courts would have invented had it not been provided by the legislature. Otherwise, a resourceful

litigant could endlessly protract any case and frustrate the efforts of the court to bring the matter to a close. The final judgment rule should not be tampered with unless the issue at stake is grave enough to justify the costs.

This Court has accordingly found few exceptions to the rule. To do otherwise would seriously disrupt the work of the district courts.

> [A]n interlocutory appeal can make it more difficult for trial judges to do their basic job--supervising trial proceedings. It can threaten those proceedings with delay, adding costs and diminishing coherence. It also risks additional, and unnecessary appellate court work either when it presents appellate courts with less developed records or when it brings them appeals that, had the trials simply proceeded, would have turned out to be unnecessary.

Johnson v. Jones, 515 U.S. 304, 309 (1995).

B. Immediate Appeals of Attorney Sanctions Orders Have Not Improved Judicial Efficiency.

This case presents the Court with one of the more troublesome opportunities to create an exception to the rule. Petitioner was sanctioned for violating pretrial discovery orders of the court. The history of the motions and pleadings which led up to the court's order are well described in the record, and had "already consumed an inordinate amount of the court's time," when the District Judge ruled. *Jt. App.* 10-22. If the rule Petitioner proposes had been adopted before

she earned the sanctions brought here, she would have been able to bring appeals from multiple sanctions awards, entwined with the appeal on the merits. There would have been no assurance of consistency in the appellate findings, given that they could well have been proceeding simultaneously.

The Court of Appeals for the Sixth Circuit observed that "several circuits have experimented with the 'immediate appeal' rule urged by Cunningham, and the experience has not been positive." *Starcher,* 144 F.3d at 424. For example, the Second Circuit adopted a rule allowing the immediate appeal of sanctions in *Cheng v. GAF Corp.*, 713 F.2d 886 (2d Cir. 1983). The court recently expressed reservations about its own result:

> The reasoning of those decisions that deny appealability is not without force in view of the salutary policies that animate the final judgment rule. Application of the *Cohen* collateral order doctrine requires careful attention to the facts of each case. In this case, the flurry of arguments, charges and counter-charges, motions and cross-motions and other papers in the district court has effectively diverted for far too long the attention of the parties and the district court from the merits of the underlying trademark litigation. Were we writing on a clean slate, we would be tempted to confine *Cheng* to its unusual facts and characterize the sanctions ordered here as nonappealable under the *Cohen* doctrine.

Lapidus, S.A. v. Vann, 112 F.3d 91, 95-96 (2d Cir. 1997)(footnote omitted).

The Seventh Circuit likewise acknowledged that its cases which permitted immediate appeal by sanctioned attorneys "have not played to universal acclaim." *Cleveland Hair Clinic, Inc. v. Puig*, 104 F.3d 123, 125 (7th Cir. 1997). Accordingly, the court declined to allow a disgruntled attorney an immediate appeal. The Seventh Circuit noted that its earlier rulings could:

> [P]roduce a substantial, and unjustified, erosion of the final decision requirement. It could readily yield three appeals, perhaps more: one to determine whether the defendants in Tinaglia committed sanctionable misconduct; a second to determine whether the District judge properly set the amount of the sanction; then a third to address the merits, which overlap the issues pertinent to sanctions. Multiplication of appeals would delay final adjudication and increase the expense of getting there, without producing material benefits.

id. at 125-126.

The Court of Appeals for the Third Circuit has refused to adopt the immediate appeal rule, now bemoaned by the Second and Seventh Circuits. The court expressed its concerns in *Borden Co. v. Sylk*, 410 F.2d 843 (3d Cir. 1969), detecting:

> [W]hat appears to be an irresistible impulse on the part of appellants to invoke the "collateral order" doctrine whenever the question of appealability arises. Were we to accept even a small percentage of the sometimes exotic

> invocations, this Court would undoubtedly find itself reviewing more "collateral" than "final" orders.

Id. at 845-846.

Courts forced to revisit the ill-conceived "sanctions" exception to the final judgment rule face a balancing process that pits the need for judicial economy and manageability against the "[H]omeric proportions that such litigation can assume. Our overburdened courts have little time or appetite for such protractions." *Id.* at 846.

C. Exceptions to the Final Judgment Rule Should be Strictly Construed and Limited.

To comply with the Congressional mandate against piecemeal appeals, this Court has construed the exceptions to the final judgment rule strictly. The Court has interpreted the requirements of the collateral order exception with the utmost strictness in criminal cases. *Flanagan v. United States,* 465 U.S. 259, 265 (1984). But the rationale supporting the final judgment rule makes it equally appropriate to strictly construe the rule in civil cases. As Justice Breyer observed in *Behrens v. Pelletier,* 516 U.S. 299, 320 (1996), "this Court and its individual Members have, in recent years, cautioned against expanding the class of orders eligible for interlocutory appeal." The case at hand exemplifies the dangers of allowing pretrial satellite appeals to erupt in the middle of a pending lawsuit. Petitioner appealed from two sanction awards, while the merits continued to run along a parallel track.

The fact that pretrial sanctions might impose a potential hardship does not justify departure from the rule.

Countless non-final orders impose hardships on the parties and their counsel, but do not thereby become appealable. For instance, in *Richardson-Merrell Inc. v. Koller*, this Court acknowledged an order disqualifying counsel may impose significant hardship on litigants and that if the grounds for disqualification were troubling, the hardship may tempt appellate courts to assert jurisdiction pursuant to § 1291. 472 U.S. at 440.

The Court reiterated the words of Judge Adams in *Bachowski v. Usery*, 545 F.2d 363, 373-374 (3d Cir. 1976):

> [I]t would seem to us to be a disservice to the Court, to litigants in general and to the idea of speedy justice if we were to succumb to enticing suggestions to abandon the deeply-held distaste for piecemeal litigation in every instance of temptation. Moreover, to find appealability in those close cases where the merits of the dispute may attract the deep interest of the court would lead, eventually, to a lack of principled adjudication or perhaps the ultimate devitalization of the finality rule as enacted by Congress.

Richardson-Merrell Inc., 472 U.S. at 440. Certainly where Cunningham is concerned, the immediate "hardship" argument rings false. She has never paid the $1,494.00 sanctions award.

Immediate appeals from interlocutory orders go against the grain of § 1291 and its objective of the efficient administration of justice in federal courts. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867-868 (1994). "Narrow" exceptions to the final judgment rule should stay

that way, and not be allowed to swallow the general rule that a party is entitled to single appeal. This Court accordingly has "described the conditions for a collateral appeal as stringent." *Id.* at 868; *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989).

D. Congress Has Provided For Interlocutory Appeals Where Necessary and Appropriate to Avoid Injustice.

Congress has provided for the appeal of interlocutory orders in deserving cases. It is telling that in this instance the Petitioner did not attempt to justify her appeal on that basis. Her situation simply does not rise to the level of urgency that has previously impelled Congress or this Court to permit immediate appeal.

A party may seek leave of the court to appeal immediately under the provisions of 28 U.S.C. § 1292(b), which permits an immediate review of an otherwise non-final order which "involves a controlling question of law as to which there is substantial ground for difference of opinion and of an immediate appeal from the order may materially advance the ultimate determination of the litigation." "[T]he availability of § 1292(b) review counsels against expanding other judicial exceptions to the rule against perceived appeals". *Behrens*, 516 U.S. at 322.

Writing for a unanimous Court in *Swint v. Chambers County*, 514 U.S. 35 (1995), Justice Ginsburg discussed at length the statutory evolution of limited exceptions to the final judgment rule, together with those statutes that "counsel resistance to expansion of appellate jurisdiction." *Id.* at 48.

> Congress has thus empowered this Court to clarify when a decision qualifies as "final" for appellate review purposes, and to expand the list of orders appealable on an interlocutory basis. The procedure Congress ordered for such changes, however, is not expansion by court decision, but by rule making under § 2072....*Congress' designation of the rule making process as the way to define or refine when a district court ruling is "final" and when an interlocutory order is appealable warrants the Judiciary's full respect.*

Id. at 48 (emphasis added).

Congress has provided other statutory and procedural alternatives, in addition to § 1292(b), which include Rule 54(b) of the Federal Rules of Civil Procedure, and 28 U.S.C. § 1651, which authorizes federal courts to issue writs of mandamus. *Johnson v. Jones,* 515 U.S. at 304.

E. A Rule Permitting Appeals of Attorney Sanctions Orders Will Inevitably Lead To Vexatious and Disruptive Appeals .

Appealability under § 1291 is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a "particular injustice" averted. *Van Cauwenberghe*, 486 U.S. at 529; *Digital Equip. Corp.*, 511 U.S. at 868. The rule proposed by the Petitioner leads inevitably to appeals in countless subcategories of cases involving sanctions imposed against the parties, solely against counsel, or jointly against the parties and counsel.

Limiting the rule to attorneys no longer participating in the case hinges on a meaningless distinction. *Anyone* — party or attorney, current or former — ordered to pay a monetary sanction today could see that sanction overturned in a later appeal. Moreover, there is no rational way to limit the appeal of trivial orders. Even the mildest of sanctions would be swept up in the immediate appealability rule. If the sanction is monetary, there is no universally meaningful dollar threshold at which the Court could establish a distinction. Non-monetary discovery sanctions defy easy description or categorization. The trial court is simply directed under Fed. R. Civ. P. 37(b)(2) to "make such orders . . . as are just." Is a discovery sanction order foreclosing a defense or prohibiting the introduction of evidence immediately appealable? Why not an order requiring the offending attorney to travel to an inconvenient locale for discovery? These lesser or informal sanctions may cost the attorney time and/or money, but they neither resolve nor terminate the litigation. They are merely steps toward the conclusion of the case, and they can be reviewed effectively upon termination of the litigation.

The more rational approach is simply to adhere to the final judgment rule and permit only those interlocutory appeals that satisfy an existing exception. The most extreme sanctions, such as a dismissal, would be "final orders" from which an immediate appeal could be taken under 28 U.S.C. § 1291.

Appellate courts that have carefully considered the implications of the immediate appeal rule have held that a party may not appeal the sanctions until the case is completed. *Johnny Pflocks, Inc. v. The Firestone Tire & Rubber Co.*, 634 F.2d 1215 (9th Cir. 1980). Likewise, courts have applied the same reasoning when sanctions are imposed jointly against the party and their counsel, holding that appeal is not appropriate

until the final judgment is entered. *Hill v. MacMillan/McGraw-Hill School Co.*, 102 F.3d 422 (9th Cir. 1996).

Judicially created exceptions to the final judgment rule have been carefully limited, and should remain so. The Court has refused to create new exceptions in analogous contexts. For instance, the financial hardship on the disqualified lawyer and client caused by mistaken disqualification is insufficient to set aside the finality requirement imposed by Congress. *Coopers & Lybrand*, 437 U.S. at 476; *Richardson-Merrell Inc.*, 472 U.S. at 436.

Litigants and their counsel will be served better by a "bright-line" rule which requires the parties to raise all issues, including sanctions, by a single appeal, to be taken at the end of the litigation. This policy will save the expense and delays of repeated appeals in the same suit, and "to have the whole case and every matter in controversy in it decided in a single appeal." *McLish v. Roff*, 141 U.S. 661, 665-666 (1891); *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 178 (1955).

II. Immediate Appeals Of Attorney Sanction Orders Do Not Satisfy The *Cohen* Criteria.

Faced with a non-final order that falls within no existing exception, Petitioner asks this Court to extend the *Cohen* doctrine to include sanctions orders. *Coopers & Lybrand v. Livesay* held that to come within the "small class" of decisions excepted from the final-judgment rule by *Cohen*, the order must: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action; and (3) be effectively

unreviewable on appeal on the final judgment. 437 U.S. at 468.

In *Coopers & Lybrand*, this Court recognized that the finality requirement of § 1291 was an indication of the Congressional intent to restrict appellate review to "final decisions," and to avoid the debilitating effect on judicial administration caused by piecemeal appeals. The Interlocutory Appeals Act of 1958, 28 U.S.C. § 1292, the Court reasoned, was enacted by the Congress to meet the need for prompt review of certain non-final orders, but was confined carefully by the Congress to ensure that review would be limited to appropriate cases and avoid time consuming jurisdictional determinations in the Court of Appeals. 437 U.S. at 474-475.

> [C]ongress is in a position to weigh the competing interests of the dockets of the trial and appellate courts, to consider the practicably of savings in time and expense, and to give proper weight to the effect on litigants .... This Court ... is not authorized to approve or declare judicial modification. It is the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction, direct or indirect, occurs in the federal system....Any such *ad hoc* decisions disorganize practice by encouraging attempts to secure or oppose appeals with a consequent waste of time and money.

Id. at 476.

In considering what types of cases come under the "small class" of interlocutory orders appealable immediately

under *Cohen*, this Court has included only those cases involving the most important of rights. Thus, the Court has reviewed orders denying a motion to reduce bail, because such an order is independent of the issues tried, and unless reviewed before sentence, can never be reviewed at all. *Stack v. Boyle*, 342 U.S. 1 (1952). The Court has permitted appeal of a pretrial motion to dismiss an indictment on double jeopardy grounds because the exposure to a second trial could not be corrected after conviction and sentence. *Abney v. United States*, 431 U.S. 651 (1977). Likewise, the Court has allowed interlocutory appeal in a criminal case to assert the immunity conferred by the Speech or Debate Clause of the Constitution. *Helstoski v. Meanor*, 442 U.S. 500 (1979). *See also Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) (orders denying immunity to state governmental instrumentalities under the 11th Amendment); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (claims of absolute immunity); and *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (claims of qualified immunity).

In the vast number of cases, however, the Court has declined to allow interlocutory appeals. *See, e.g., United States v. MacDonald*, 435 U.S. 850 (1978) (motion to dismiss an indictment for violation of the Sixth Amendment right to a speedy trial); *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989) (prosecutorial misconduct occurring before the Grand Jury); *Johnson v. Jones*, 515 U.S. 304 (1995) (motions for summary judgment based upon qualified immunity which raise factual issues); *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988) (immunity from civil process and *forum non conveniens*); *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994) (order vacating a dismissal predicated on settlement agreement); *Flanagan v. United States*, 465 U.S. 259 (1984) (disqualification of a criminal defense attorney); *Firestone Tire & Rubber Co. v. Risjord*,

449 U.S. 368 (1981) (orders denying disqualification of counsel in civil cases); and *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424 (1985) (order disqualifying counsel in a civil case for misconduct).

Appellate courts are properly reluctant to interfere with the pretrial discovery process. *See* Wright, Miller and Cooper, 15B *Federal Practice and Procedure: Jurisdiction 2d.* § 3914.23. Routine appeals from disputed discovery orders would disrupt the orderly process of litigation, swamp the courts of appeals and substantially reduce the district court's ability to control the discovery process. *Id.*

A. The Imposition Of Monetary Sanctions Against An Attorney For Pretrial Misconduct Does Not Necessarily Satisfy The Requirement That The Matter Be "Conclusively Resolved."

Although the Sixth Circuit Court of Appeals found that the first *Cohen* factor is satisfied here, it does not follow that the imposition of monetary sanctions against an attorney in an ongoing case is necessarily an order which is "conclusively determined."[5]

"The 'conclusive determination' requirement means that appellate review *now* is likely needed to avoid that harm."

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[5] Respondent has previously conceded that the subject order meets the first prong of *Cohen*. See *Brief of Respondent in Opposition to Petition for Writ of Certiorari* at 11. That concession is not intended to imply that the issue is so clear as characterized by the Sixth Circuit, nor does it mean that every sanctions order would meet the first prong of the test.

Behrens, 516 U.S. at 315. Justice Rehnquist remarked in *Firestone Tire & Rubber Co. v. Risjord*:

> [I]t is not at all clear to me, nor has it been to the courts considering the question, that an order denying a motion for disqualification of counsel conclusively determines the disputed question. The District Court remains free to reconsider its decision at any time. . . . [T]he possibility of reconsideration by the trial judge cannot be dismissed as merely theoretical.

449 U.S. at 381 (citations omitted).

Petitioner moved the District Court to stay the collection of the sanctions pending by November 1, 1996, and the stay was subsequently granted by the District Court. *Jt App.* 6, Doc. 138.[6] "Sanctions imposed during the pendency of the case, but not made immediately payable, may well later be rescinded by the court." *Ortho Pharm. Corp. v. Sona Distrib.*, 847 F.2d 1512, 1515 (11th Cir. 1988). Petitioner's sanctions have yet to be paid and, as a practical matter, might never have been paid had this appeal not been filed. The case could have settled and the sanctions rescinded by the Court as part of the settlement agreement. Even after a verdict, the District Court could have revoked "the sanction in order to secure a settlement of the litigation. The kind of speculation on future harm the parties offer here is of precisely the kind the Supreme Court rejected in *Firestone*." 796 F.2d at 573.

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6 An ironic example of the perhaps petty disruption of the underlying litigation centers around this document, which cannot be located by the District Court or Circuit Court, although it is reflected in the docket. The Record before this Court may not be complete, or the records in the three appellate cases or the district court record may also be incomplete.

The court could change its mind based upon any number of factors unique to a given case.

B. An Order Imposing Monetary Sanctions Against An Attorney For Pretrial Misconduct Does Not Resolve An Important Issue Completely Separate From The Merits Of The Action.

The decision to impose sanctions against an attorney for discovery violations under Fed. R. Civ. P. 37 is entwined with the merits of the underlying case, and cannot be effectively separated from the merits. Further, the imposition of sanctions against an attorney under Fed. R. Civ. P. 37 is not the type of "important" issue which requires an immediate appellate review.

The second prong of the *Cohen* collateral doctrine rule as set forth in *Coopers & Lybrand v. Livesay*, is that the interlocutory order must "resolve an important issue completely separate from the merits of the action." 437 U.S. at 468.

This Court has focused on two aspects of the "separability" prong of the *Cohen* doctrine. First, to qualify for an immediate interlocutory appeal, "the order must involve an 'important' right which would probably be irreparably lost, if review had to await final judgment." *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 502 (1989). The requirement of "importance" applies not only to the "separability" requirement, but must also be read in conjunction with the third *Cohen* requirement, the determination if the right is effectively reviewable. *Digital Equip. Corp.*, 511 U.S. at 878.

The second part of the "separability" test is the determination of whether the order involves considerations that are "enmeshed in factual and legal issues compromising the plaintiff's cause of action." *Coopers & Lybrand*, 437 U.S. at 469.

1. The Petitioner Has Not Identified an Important Interest Which Justifies an Immediate Appeal.

This Court has identified as "sufficiently important" to justify an interlocutory appeal those interests that approach or touch upon fundamental rights of far more urgency than the interests of an attorney in a monetary sanction. The interest in avoiding imprisonment and excessive bail, *Stack v. Boyle*, 342 U.S. 1 (1952); double jeopardy, *Abney v. United States*, 431 U.S. 651 (1977); Speech or Debate, *Helstoski v. Meanor*, 442 U.S. 500 (1979); absolute immunity, *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); qualified immunity of governmental officials, *Mitchell v. Forsyth*, 472 U.S. 511 (1985); or Eleventh Amendment immunity of state governments and instrumentalities, *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993); are the types of "important" rights, normally rising to a Constitutional level, which must be protected by an immediate appeal.

There are sound reasons for treating these rights differently from the rights of an attorney who is sanctioned for discovery misconduct. If the right Petitioner seeks to vindicate is the damage to her reputation caused by sanction, that right can be "just as effectively rehabilitated through an appeal from final judgment as through an interlocutory appeal." *Howard v. Mail-Well Envelope Co.*, 90 F.3d 433, 436 (10th Cir. 1996).

If the concern is monetary, there is one obvious remedy - repayment. Alternatively, the court could stay the order pending final judgment, as happened here. The risk of non-repayment in the event or a reversal "does not, without more, constitute irreparable harm sufficient to qualify an order for immediate review." *Eastern Maico Distrib. Inc.*, 658 F.2d at 948.

If, as the Petitioner claims, this is an important right because of the financial hardship imposed on the Petitioner, then denial of sanctions should be appealable immediately as well. It places no less burden on innocent counsel and parties whose costs are multiplied by discovery abuses. Had the district court denied the requested sanctions, however, the appeal would no doubt have waited until the end of the case. *Cassidy v. Cassidy*, 950 F.2d 381, 383 (7th Cir. 1991). There is no justification for the position that an attorney who is sanctioned for "egregious" conduct during pretrial discovery has more "important" rights than an innocent party who has been required to suffer the burden of compelling discovery.

2. Appellate Review of the Sanctions Imposed Against Petitioner For "Egregious" Misonduct, during Pretrial Discovery Involves Considerations Enmeshed in the Merits.

The second part of the "separability" prong of the collateral order doctrine is a determination of whether the sanction is inextricably entwined with the merits of the underlying action. On this issue, the Sixth Circuit concluded "that the issues involved in Cunningham's appeal likely would not turn out to be completely separate from the merits of the underlying case." *Starcher*, 144 F.3d at 424.

The Sixth Circuit found that the underlying litigation involved a dispute over the response to interrogatories and the request for the production of documents. Because the Petitioner had provided responses to at least some of the Defendant's discovery requests:

> [P]resumably her challenge to the district court's Rule 37 order would be that her responses were sufficient at the time they were provided. To resolve such a debate, we would be required to consider, among other things, the available evidentiary support for each of the many specific contentions questioned by the defendants. This process would differ only slightly from an inquiry into the merits.

Id.

This Court has held that "considerations of delay, comparative expertise of trial and appellate courts, and wise use of appellate resources argue in favor of limiting interlocutory appeals . . . to cases presenting more abstract issues of law." *Johnson*, 515 U.S. at 317. Unlike the usual questions involving immunity, discovery disputes will draw appellate courts into evidentiary determinations which differ only slightly from an inquiry into the merits. Similar to the resolution of a speedy trial claim, discovery disputes will "necessitate a careful assessment of the particular facts of the case . . . best considered only after the relevant facts have been developed at trial." *MacDonald*, 435 U.S. at 858.

One of the best examples of questions arising from attorney misconduct is found in *Richardson-Merrell Inc.*, which recognized that "appellate review of orders disqualifying counsel for misconduct may be entwined with

the merits of the litigation." 472 U.S. at 439. The Court concluded that orders disqualifying counsel in civil cases, as a class, are not sufficiently separable from the merits to qualify for interlocutory appeal. *Id.*

Many courts of appeals which have addressed this issue have also recognized that sanctions imposed by a District Court judge under Rule 37 are inseparable from and collateral to the review of a case. In *Evanson*, the Temporary Emergency Court of Appeals was asked to review sanctions of $60,961.09 against a defendant for giving false responses to interrogatories. The court held that the sanctions were not separable or collateral, but instead were "enmeshed in the factual and legal issues comprising the plaintiff's cause of action." 619 F.2d at 74.

Likewise, the Third Circuit found it could not avoid reviewing the core facts in the case when examining a discovery sanction award. To consider whether documents requested by the defendants were relevant, the appellate court would have to consider the nature of the claims against each defendant and reach some conclusion as to the relative importance of the discoverable material, thereby failing to satisfy the second criteria of collateral order rule. *Eastern Maico Distrib., Inc.*, 658 F.2d at 947.

Had the Court of Appeals reached the merits of Petitioner's claims, it would have reviewed the district court order in context of the full factual record to determine if there was an abuse of discretion. *Regional Refuse Sys., Inc. v. Inland Reclamation Co.*, 842 F.2d 150, 154 (6th Cir. 1988). As part of that review, the Court of Appeals would have been required to consider and rule on the following issues: prejudice to the sanctioned party's adversary; whether the sanctioned party was warned that failure to cooperate could

lead to an adverse judgment; whether less drastic sanctions were imposed or considered; and the degree of willfulness or culpability of the recalcitrant party. *Taylor v. Medtronics, Inc.*, 861 F.2d 980, 986 (6th Cir. 1988).

Any appellate review of the sanctions in this case will entangle the Court of Appeals in the merits. If the courts must review these issues, a single appeal, after final resolution of the case, with a complete record, will best serve the interests of judicial efficiency and justice.

Petitioner urges this Court to apply the holdings of *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) and *Willy v. Coastal Corporation*, 503 U.S. 131 (1992) to this case. Both, however, are distinguishable. In *Cooter & Gell*, the court held that Rule 11 sanctions may be imposed even after a voluntary dismissal pursuant to Rule 41(a) of the Rules of Civil Procedure. 496 U.S. at 408. On appeal, this Court held that nothing in the language of Rule 41(a)(1)(i), Rule 11 or any other federal statute or rule terminated the district court's authority to impose sanctions after dismissal. *Id.* at 395. The Rule 11 sanction did not require the district court's assessment of the legal merits of the complaint. *Id.* at 396. Instead, it was a determination of whether the attorney had abused the judicial process in a voluntarily dismissed case. *Id.* at 399. This is wholly different from a Rule 37 sanction, which is typically imposed while the case is still in progress, and which does require the District Court to consider the relative value of the discovery sought, or the surrounding circumstances of the case.

In *Willy v. Coastal Corp.*, the Court held that Rule 11 sanctions may be imposed even if the district court is later determined to have been without subject matter jurisdiction. 503 U.S. at 138. The Court recognized that courts have an

interest in the maintenance of orderly procedure, even in an action for which jurisdiction is later found lacking. *Id.* at 137. Even if the determination of Rule 11 sanctions after the resolution of the merits of the case are "collateral" to the merits of the underlying case, Rule 37 sanctions ordered during pendency still implicate the merits.

In the case before the Court the fee issue is not "collateral" to an order ending the litigation on the merits. Instead it was part of an order compelling discovery in an effort to move the litigation toward the ultimate conclusion. *Willy* and *Cooter & Gell* dealt with Rule 11 sanctions, which occurred after the determination of the litigation. Appellate courts upholding the appealability of Rule 11 sanctions have noted:

> [T]he sanctioned conduct here does not relate to discovery activity, which is typically related to the merits of the underlying litigation, but, rather, to the district court's perception, wholly collateral to the merits of the case, that appellant deliberately disobeyed an order granting leave to file an amended pleading.

Eavenson, Auchmuty & Greenwald v. Greenwald, 775 F.2d 535, 538 n.6 (3d Cir. 1985).

Cooter & Gell, and *Willy* cannot be applied logically to a Civil Rule 37 sanction order in a pending case.

C. The Imposition Of Monetary Sanctions During Pretrial Discovery Is Effectively Reviewable On Appeal From The Final Judgment.

The third prong of the *Cohen* doctrine is the requirement that an order must be effectively unreviewable on appeal from a final judgment. Perhaps the best examples are cases involving the right to a reasonable bail. Even if the appellate court were to conclude that the District Court erred in setting the bail, it could never restore the appellant's freedom. Likewise, in cases involving absolute or qualified immunity or immunity under the Eleventh Amendment, the appellate court could never restore the right not to be subjected to expense and vexation of trial.

Such cases each involve an absolute right, "the legal and practical value of which could be destroyed, if not vindicated before trial." *United States v. MacDonald* 435 U.S. 850, 860 (1978). By contrast, this Court has normally denied review of pretrial discovery orders. *United States v. Ryan*, 402 U.S. 530, 533 (1971). "[I]n the rare case when [an] appeal after final judgment will not cure an erroneous discovery order, the party may defy the order, permit a contempt citation to be entered against him, and challenge the order on direct appeal of the contempt ruling." *Alexander v. United States*, 201 U.S. 117 (1906); *Cobbledick v. United States*, 309 U.S. 323, 327 (1940); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981).

A pretrial sanctions order is not unlike the disqualification of counsel, for which this Court has consistently refused to allow an interlocutory appeal. See *Flanagan*, 465 U.S. at 270; *Firestone Tire & Rubber Co.*, 449 U.S. at 379; and *Richardson-Merrell Inc.*, 472 U.S. at 440. The Court has noted that even the important right to counsel can be best reviewed after final judgment. If so, monetary sanctions of $1,494.00 imposed against an attorney for "egregious" misconduct can also be reviewed effectively after the conclusion of the case, when all the facts been fully

developed and the relevancy of the requested discovery is established fully. The appellate review of the imposition of sanctions will be no different from review of an order denying sanctions.

One of the most frequently cited cases for the Petitioner's view is *Cheng v. GAF Corp.*, 713 F.2d 886 (2d Cir. 1983), holding that sanctions are immediately appealable. However, the sanctions involved in *Cheng* were "attorneys' fees, costs and expenses against appellant's lawyer ... for petitions filed in the appellate courts." *Id.* at 888. The Second Circuit concluded "that on the 'unusual facts of this case' the district court order was appealable under *Cohen*." *Cheng*, 713 F.2d at 890. The decision has been subsequently criticized by a number of courts, including the Second Circuit itself in *Lapidus, S.A. v. Vann*, 112 F.3d 91, 96 (2d Cir. 1997), where the court suggested that if it were writing on a clean slate, it would be tempted to limit *Cheng* to its unusual facts. Judge Timbers' dissent in *Cheng* has been found persuasive by a variety of courts holding that sanctions imposed against attorneys, pursuant to 28 U.S.C. § 1927, should properly be appealed at the end of the case. Judge Timbers noted:

> [I]f an attorney were required to take an interlocutory appeal in order to preserve his right to appeal from an order awarding fees every time a court imposes a § 1927 sanction, it is apparent that the purpose of Congress in reducing litigation delays by amending § 1927 to include reasonable attorneys' fees would be undermined by the very statute which sought to reduce unwarranted delays.

713 F.3d at 894. He concluded that the fee order was not effectively unreviewable on appeal. *Id.* at 895.

The better reasoned view, informed by the experiences following the errors made in *Cheng* is that the "[a]ppeal of the sanction is best heard after final judgment. If the judgment is appealed, it will be helpful to the appellate court to be able to review the order against the background of the case as whole. This is also more efficient and cost effective." *In Re Licht & Semonoff*, 796 F.2d at 572.

Immediate appeal of sanctions ordered under Rule 37 will not materially advance the ultimate termination of the litigation in that "[t]he validity of the discovery sanctions can be questioned, along with any other issues in this proceeding, following a final decision." *Evanson*, 619 F.2d at 74.

The Court of Appeals for the Federal Circuit, following the reasoning of the First, Third, Fifth and Tenth Circuits, held that sanctions against an attorney are reviewable after final judgment is entered, and that no harm would befall the sanctioned attorney by postponing the appeal of the sanction order until final judgment was entered. Even if there were no appeal on the merits, the attorney would be able to seek review of the sanction order after the action is ended. *Sanders Assoc. v. Summagraphics*, 2 F.3d 394, 398 (Fed. Cir. 1993).

The Third Circuit Court of Appeals addressed this issue in *Eastern Maico Distributors, Inc. v. Maico-Fahrzeugfabrik*, 658 F.3d 944, 948 (3d Cir. 1981):

> [L]ike the collateral order exception articulated in *Cohen*, a rule permitting appeals by non-parties must reflect a "practical" construction

> of Section 1291 in order not to create an intractable morass of appeals that would unnecessarily obstruct district court resolution of cases.

In *Eastern Maico*, the Court found that the orders were fully reviewable on appeal from the final judgment, and that the risk of non-recovery of the sanctions, if the amount was paid, did not constitute irreparable harm sufficient to qualify the order for immediate review. The Court further reasoned:

> No irreparable harm is suffered by the party if it must pay the expenses immediately and then await final adjudication of the claim. At least the harm is no less than what the opposing party would suffer it did not receive its expenses until after final judgment.

Id. The Third Circuit went on to observe that "[a]n attorney sanctioned for such conduct by and large suffers no inordinate injury from a deferral of appellate consideration of the sanction. *Id.* at 950.

The Seventh Circuit addressed the issue in *Cleveland Hair Clinic Inc. v. Puig*, 104 F.3d 123, 126 (7th Cir. 1997), holding that "[a] disgruntled attorney will be able to present the sanctions issue on appeal from the final decision, even if the sanctioned litigant chooses not to, because appeal at the end of the case brings up all interlocutory orders."

The Ninth Circuit rejected immediate sanction appeals in *Johnny Pflocks, Inc. v. The Firestone Tire & Rubber Co.*, 634 F.2d 1215 (9th Cir. 1980), a case involving $7,862.00 in

attorneys fees and costs, imposed as sanctions under Rule 37, for failure to provide complete answers to interrogatories.

> *Cohen*, clearly indicates that appeals may not be taken from orders that effectively may be reviewed and corrected if and when final judgment results. 337 U.S. at 546. Here the order requiring payment of costs and fees can be reviewed and corrected when final judgment is entered. There is no need for treating such an issue piece-meal.

Id. at 1216.

Likewise, the Tenth Circuit in *G.J.B. & Associates, Inc. v. Singleton*, 913 F.2d 824, 829 (10th Cir. 1990), rejected any notion "that an attorney will lose the right to appeal if the parties settle or elect not to appeal from the final judgment," and held that "counsel must await the conclusion of the underlying lawsuit before appealing sanctions under § 1291." The Tenth Circuit saw "nothing to prohibit an attorney of record from appealing a sanction order when the main case concludes. Such an appeal is best heard after final judgment, since the Appellate Court will likely need to review the record as a whole to determine the propriety of sanctions." *Id.*

This is especially true where, as here, sanctions arise from a pretrial dispute over discovery. The Tenth Circuit was also concerned about the possibility of delay if an attorney could immediately appeal the imposition of sanctions:

> Indeed, it would be ironic to appeal from a sanction order, inevitably delaying lower court proceedings, when that order may have resulted from tactics that

> already unjustifiably delayed the proceedings. While we are aware that a sanction order may have some effect on the attorney-client, this possibility alone is not enough to make the order "effectively unreviewable" at a later time. An attorney's obligation is to serve the client's interests at all time ethically.

Id.

Although the Sixth Circuit below focused primarily on the second element of the *Cohen* test, it saw "no reason why, after final resolution of the underlying case, a sanctioned attorney should be unable to appeal the order imposing sanctions." *Starcher*, 144 F.3d at 425.

Because she was removed from the case, Petitioner argues that she should enjoy an immediate right of appeal which she would not have enjoyed without the disqualification. The distinction is meaningless. There is no rational basis for conferring greater rights on an attorney who is disqualified than upon one who is not. Both can await the outcome of the merits before appealing. For the same reasons which lead them to reject a blanket rule that all sanctions were appealable immediately under *Cohen*, the Tenth Circuit reasoned:

> We see no reason to create an exception to this general rule and allow attorneys who no longer represent a party in the underlying case an immediate opportunity to relieve themselves of the consequences of their misconduct merely because those consequences are monetary, nor could such a holding be reconciled with our decision in *G.J.B. & Assoc.* We also see no

> reason to permit an immediate appeal under *Cohen* so that Mr. Smith can, without delay, attempt to somehow rehabilitate his reputation by persuading us to set aside the district court's decision.

Howard, 90 F.3d at 437.

The Sixth Circuit also reflected on some of the broader reasons for rejecting the distinction between participating and non-participating attorneys:

> Expanding the collateral order doctrine to cover cases like Cunningham's seems particularly unwise at a time when requests for sanctions are increasingly used more for tactical purposes than to seek redress for true discovery abuses. Creating a distinction between participating and non-participating attorneys could add another tactical arrow to the arsenal; litigants confronted with especially skilled or tenacious counsel could move for sanctions in a calculated attempt to force the attorney to withdraw from the case. For all these reasons, we decline to adopt a distinction between participating and non-participating attorneys for purposes of the collateral order doctrine.

Starcher, 144 F.3d at 425.

Finally, the Sixth Circuit noted the practical, administrative problems with a rule that hinged on the attorney's participation in the case. As it happened, Petitioner was disqualified on the same day the District Judge upheld the

sanction order, but she might as easily been disqualified or withdrawn months or years later. The courts would then be drawn into the debate as to when the "non-appealable" sanction had matured into an "appealable" order. The Sixth Circuit found the situation fraught with difficulty. *Id.* It was correct.

If this Court concludes that an attorney may properly appeal a sanction at the conclusion of the litigation, the only additional obligation imposed upon the non-participating attorney, will be the inconvenience of monitoring the case and effecting the appeal at the appropriate time. This administrative inconvenience should not be allowed to outweigh finality requirements of § 1291 and all of the disadvantages attendant to interlocutory appeals.

Petitioner makes a final argument that the circuit court should have asserted jurisdiction under Fed. R. App. P. (4)(a)(2). *Brief for Petitioner,* n.14. Fed. R. App. P. (4)(a)(2) provides that a notice of appeal filed after a court announces its decision, but before the entry of judgment, is treated as being filed on the date of and after the entry. Petitioner has not raised this point before, but Fed. R. App. P. (4)(a)(2) is designed to protect the party who appeals a decision, announced by the court, before the judgment entry is filed. *Firstier Mortgage Co. v. Investors Mortgage Co.*, 498 U.S. 269 (1991). It does not apply to this case.

Petitioner argues that the circuit court's decision gives her no right of appeal, at all. Unfortunately for Petitioner, she was very involved in the case, although not as counsel of record. She chose not to perfect her appeal when final judgment was rendered, knowing that the jurisdiction of the court of appeals over her original appeal was being challenged. Petitioner could easily have filed another notice

of appeal, and moved to consolidate all of the appeals pursuant to Fed. R. App. P. 3(b). She chose not to do so.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that the judgment of the United States Court of Appeals for the Sixth Circuit be AFFIRMED.

Respectfully submitted,

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